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No. 78-1470

In the Supreme Court of the United States

OCTOBER TERM, 1978

MARY FRANCIS LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-6a) is reported at 588 F. 2d 450.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1979. A petition for rehearing was denied on February 21, 1979. The petition for a writ of certiorari was filed on March 23, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the jury selection plan for the Northern District of Texas is unconstitutional because it results in jury service by fewer Mexican-American citizens than might be expected on the basis of population.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of the intentional obstruction of correspondence, in violation of 18 U.S.C. 1702.[1] She was sentenced to a suspended term of two years' imprisonment and was placed on probation for that period. She was also fined $1,000. The court of appeals affirmed (Pet. App. 3a-6a).

Before trial, petitioner moved to quash the impaneled petit jury on the ground that it was unconstitutionally selected and failed to represent a cross-section of the population in the Lubbock Division of the Northern District of Texas. During the hearing on this motion, petitioner introduced census evidence showing that in 1970 persons with Spanish surnames accounted for approximately 20% of the population in the Lubbock Division of the Northern District of Texas (Tr. 35; Def. Exh. 8).[2] In contrast, petitioner asserted, the Marshal's lists of persons summoned for jury duty during the years 1971 to 1978 revealed that a much smaller percentage of the persons summoned had Spanish surnames.[3] Several witnesses familiar with the area

[1]The evidence at trial, which petitioner does not contest, showed that she endorsed and deposited into her husband's business account a United States Treasury check that had been mailed to a third party.

[2]"Tr." refers to the transcript of the hearing on petitioner's motion to quash. The hearing occurred on June 13, 1978. The jury was chosen the previous day, and petitioner was tried on June 16, 1978.

[3]In her petition (Pet. 4, 6; Pet. App. 12a), petitioner states that, from August 1971 through June 1978, approximately 4.3% of the persons summoned for jury duty in the Lubbock Division of the Northern District of Texas had Spanish surnames. At the hearing in the district court, petitioner's counsel stated (Tr. 69) that the correct figures were approximately 2.0% in 1974, 2.5% in 1975, 2.3% in 1976, 4.5% in 1977, and 5.2% in the first half of 1978. The tables reprinted in Appendix D to the petition (Pet. App. 8a-12a) appear to contain some significant computational errors. For example, the total for the Marshal's Summons Lists in 1974 seemingly should read "6/205 = 2.9%" rather than "2/205 = .09%" (see Pet. App. 10a). If these apparent errors were corrected throughout the Marshal's Summons List tables, the total figures for 1971 through 1978 would become "98/1588 = 6.2%" rather than "69/1608 = 4.3%" (see Pet. App. 12a). Assuming the accuracy of petitioner's raw data, her statistics would still demonstrate that persons with Spanish surnames are not as well represented among persons summoned to serve on juries as they are in the general population.

testified that the Mexican-American population was an identifiable group, increasing in number and including many members qualified to serve as federal jurors (Tr. 33-34, 36, 43-44, 50, 52-53, 56-59). The witnesses also stated that there was some prejudice and discrimination against Mexican-Americans in the area, but that the problem was not as serious as it had been and that the situation was improving (Tr. 37, 44-47, 51). They further testified (Tr. 39, 45, 51-53, 53-55, 60, 61-62) that in recent years they had not witnessed resistance or impediments to minority group members seeking to register to vote; in fact, they said, voter registration drives directed at the Mexican-American population had been relatively successful, although a substantial number of eligible Mexican-Americans remained unregistered.

Petitioner's attorney disavowed any contention that the Clerk of the district court was administering the District's jury selection plan in a discriminatory fashion and admitted that the evidence showed there was no

interference with the voting rights of persons with Spanish surnames (Tr. 71-73).

The district court agreed (Tr. 71) with petitioner that the percentage of persons with Spanish surnames was greater in the general population than among those summoned for jury duty. Nevertheless, relying on the testimony of the witnesses and on the Clerk's Certificate of Compliance with the Jury Selection Plan,[4] the court found (Tr. 72, 112) that the plan had been followed and that jury panels had been selected on an objective, non-discriminatory basis. The court therefore concluded that the statistical disparity stressed by petitioner demonstrated only that the percentage of voter registrants within the Mexican-American population was lower than the corresponding percentage in the population as a whole. Because the evidence showed that the disparity was not the product of discrimination in the jury selection process, the court denied petitioner's motion to quash (Tr. 111-113).[5]

[4]The Clerk's Certificate and its formal acceptance by the district court are reprinted in the Appendix, *infra*.

[5]The court also stated (Tr. 113) that the motion could and should be denied because petitioner failed to follow the procedures established for challenging jury selection methods under the Jury Selection and Service Act of 1968, 28 U.S.C. 1867. But petitioner's claim is constitutional; she does not challenge the district court's plan for non-compliance with the 1968 statute, and, accordingly, she is not obliged to observe the procedural requisites of that Act. See, *e.g.*, *United States* v. *De ALBA-CONRADO*, 481 F. 2d 1266, 1270 n.5 (5th Cir. 1973).

The court of appeals affirmed, holding that petitioner failed to meet her burden of showing that "the exclusion of a particular minority group from jury service is due to some form of intentional discrimination" (Pet. App. 5a). Citing *Castaneda* v. *Partida*, 430 U.S. 482, 494 (1977), the court stated that "[i]n order to establish a prima facie case of discrimination in the selection of jurors, a defendant must show * * * that the selection procedure is not racially neutral or is susceptible to being used as a tool of discrimination" (Pet. App. 4a). The court concluded that petitioner did not make such a showing in connection with the practice of selecting jurors at random from voter registration lists in the Northern District of Texas.

ARGUMENT

Petitioner contends (Pet. 5-11) that the jury selection plan in effect in the Northern District of Texas systematically excludes Mexican-Americans and that she therefore was denied her Sixth Amendment right to a jury drawn from a fair cross-section of the community. She argues that the statistics she introduced showed an underrepresentation of persons with Spanish surnames on the jury service lists for the years 1971 through 1978.[6] This

[6]Petitioner states (Pet. 4) that persons with Spanish surnames account for more than 20% of the total population in the Lubbock Division of the Northern District of Texas. Because the Northern District's jury selection plan relies on voter registration lists, however, the voting age population provides a more accurate point of comparison. As the computations in the government's brief in the court of appeals show (Br. 9 n.6 and Addendum), persons with Spanish surnames constitute slightly less than 15% of the Lubbock Division's voting age population. Even this figure may overstate the percentage of Spanish surnamed persons eligible to serve on juries in the district, since it may include a number of persons who are not citizens or who do not speak English (see 28 U.S.C. 1865(b)).

showing of underrepresentation, petitioner asserts, was sufficient to establish a prima facie case of discrimination, a case that the government's evidence failed to rebut. Petitioner is incorrect.

Earlier this Term, in *Duren* v. *Missouri*, No. 77-6067 (Jan. 9, 1979), this Court summarized the requirements for a prima facie showing of discrimination in the jury selection process. The Court stated (slip. op. 6):

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Petitioner's evidence failed to satisfy the third part of this test. The statistics derived from the Marshal's jury service lists do not show that the underrepresentation of Mexican-Americans is due to "systematic exclusion" of the group in the jury selection process. Indeed, the jury selection plan in effect in the Northern District of Texas does not systematically exclude any ethnic group. Jury service lists are drawn at random from lists of registered voters in each county comprised within the Northern District. Petitioner does not contend that the random selection process excludes registered Mexican-American voters; nor does she argue that Mexican-Americans are prevented or discouraged from registering to vote in the District. The statistical disparity between the percentage

of persons with Spanish surnames in the voting age population and the percentage of persons with Spanish surnames on the Marshal's jury lists is not by itself sufficient to show "systematic exclusion" within the meaning of *Duren*. If it were, the third requirement for a prima facie case enumerated in *Duren* would be superfluous. Any showing of underrepresentation continuing over a period of time would be sufficient to establish "systematic exclusion."

In several cases, this Court has invalidated jury selection systems that resulted in the exclusion or underrepresentation of an identifiable group and thereby deprived defendants of their right to a jury drawn from a fair-cross-section of the community. See, *e.g.*, *Castaneda* v. *Partida*, 430 U.S. 482 (1976); *Taylor* v. *Louisiana*, 419 U.S. 522 (1975); *Alexander* v. *Louisiana*, 405 U.S. 625 (1972); *Turner* v. *Fouche*, 396 U.S. 346 (1970). In each of these cases, however, the jury selection plan involved some subjective device by which members of the identifiable group could choose to exclude themselves or could be deliberately excluded by those charged with the responsibility for jury selection. *Castaneda*, for example, involved the Texas "key man" system under which county grand jurors were selected, largely on a subjective basis, by appointed jury commissioners. If the commissioners had been so disposed, they could easily have arranged for an identifiable ethnic or racial group to be underrepresented on the grand jury lists. *Taylor* involved the Louisiana "opt-in" requirement for women who wished to serve on petit juries. The state law provided that a woman would not be selected for jury service unless she had previously filed with the court clerk a "declaration of her desire to be subject to such service."

Not surprisingly, this additional statutory hurdle, applicable only to women, resulted in the underrepresentation of women on Louisiana juries. Here, by contrast, the objective, random nature of the jury selection method employed in the Northern District of Texas does not permit the systematic exclusion of any group represented on the registered voter lists.

In enacting the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*, Congress approved the use of voter registration lists as the principal source of names of prospective jurors.[7] Federal courts that have considered the matter have sustained the use of such lists as the basis for compiling lists of prospective jurors, even when defendants have objected that this method of jury selection results in the underrepresentation of identifiable groups whose members are underrepresented among registered voters. See, *e.g.*, *United States* v. *Arlt*, 567 F. 2d 1295, 1297 (5th Cir.), cert. denied, 436 U.S. 911 (1978); *United States* v. *Grismore*, 546 F. 2d 844, 848 (10th Cir. 1976); *United States* v. *Freeman*, 514 F. 2d 171 (8th Cir. 1975); *United States* v. *Guzman*, 468 F. 2d 1245 (2d Cir. 1972), cert. denied, 410 U.S. 937 (1973). See also *United States* v. *Goff*, 509 F. 2d 825 (5th Cir.), cert. denied, 423 U.S. 857 (1975); *Simmons* v. *United States*, 406 F. 2d 456, 462-463 (5th Cir.), cert. denied, 395 U.S. 982 (1969) ("[n]o significant improvement in our nation's federal judicial machinery has ever met such unanimity of opinion as to its importance and propriety as has adoption by the Congress of the system of jury selection at random from voter registration lists.")

[7]Congress also provided that the jury selection plan for each federal district "shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by" the statutory provisions prohibiting exclusion from jury service on the basis of "race, color, religion, sex, national origin, or economic status." See 28 U.S.C. 1862, 1863(b)(2).

Petitioner does not argue that the failure of the Northern District's plan to prescribe sources of names in addition to the voter lists violates the requirements of Section 1863(b)(2). See note 5, *supra*.

Petitioner does not allege that the jury selection plan for the Northern District of Texas was adopted with an intent to discriminate against Mexican-Americans, nor does she suggest that state or county election officials in the District have placed special obstacles in the path of Mexican-Americans who wish to register to vote. It is true, of course, that any Mexican-American in the District who wishes to avoid federal jury service can do so by refusing to register to vote. But this voluntary method of self-exclusion is an option available to every person of voting age in the District, not just to Mexican-Americans or persons with Spanish surnames. The jury selection plan thus does not entail any special dispensation for an identifiable group that results in the underrepresentation of that group on jury lists. The Court in *Duren* found the Missouri selection system objectionable because it permitted women, and only women, to obtain an exemption from jury service upon request. No such systematic method of reducing the representation of Mexican-Americans is inherent in the Northern District's jury selection plan.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1979

DOJ-1979-06

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

MISCELLANEOUS NO. 16

FINDINGS OF THE COURT AND ORDER TO FILL THE QUALIFIED JURY WHEEL IN THE LUBBOCK DIVISION

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
SEP. 27, 1977
JOSEPH McELROY, JR., CLERK
BY /s/ Peggy Thillet
Deputy

Based on the report and recommendations of the Clerk made on the 27th day of September, 1977, and based on the information contained in the returned juror qualification questionnaires mentioned therein;

THE COURT FINDS that five hundred forty (540) persons identified in the report are disqualified and/or exempt or excused for the reasons set out in the Plan for Selection of Jurors in the Northern District of Texas, to which reference is made on the back of the questionnaires.

THE COURT FURTHER FINDS that the remaining eight hundred eighty (880) persons identified in the report are qualified for jury sevice.

IT IS, THEREFORE, ORDERED that the previously existing jury wheels in the Lubbock Division be purged and after all persons selected to serve as jurors before the Master Wheel was emptied, have completed such service, that all records and papers complied and maintained by the Jury Commission or Clerk before the Master Wheel was emptied, shall be preserved in the custody of the Clerk for four (4) years and shall be available for public inspection for the purpose of determining the validity of the selection of any jury as provided in section 1868, Title 28, United States Code.

IT IS FURTHER ORDERED that the names of eight hundred eighty (880) persons found to be qualified be placed in the Qualified Jury Wheel in the Lubbock Division and that all jurors summoned to appear on or after October 1, 1977, be drawn therefrom.

ENTERED this 27th day of September, 1977.

/s/ W.M. Taylor
JUDGE, UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

MISCELLANEOUS NO. 16

CERTIFICATE OF COMPLIANCE WITH THE ORDER OF THE COURT HERETOFORE ENTERED ON MARCH 14, 1977, RELATING TO SELECTION OF JURORS, TOGETHER WITH THE REPORT AND RECOMMENDATION OF THE CLERK PERTAINING TO THE LUBBOCK DIVISION

U.S. District Court
Northern District of Texas
FILED
SEP. 27, 1977
JOSEPH McELROY, JR., CLERK
BY /s/ Peggy Thillet
Deputy

Pursuant to the Order of the Court heretofore entered on the 14th day of March, 1977, and in accordance with the procedure outlined in paragraph 5 of the Plan for Selection of Jurors in the Northern District of Texas, the names of four percent (4%) of the registered voters in each county in the Lubbock Division were selected for filling of the Master Jury Wheel. Twenty-five (25) numbers were placed in a container and number ten (10) was selected at random therefrom. Beginning with the tenth (10th) name on each county list, every twenty-fifth (25th) name was taken. A total of seven thousand five hundred thirty-seven

(7,537) names was obtained, reflecting a total voter population of one hundred eighty-eight thousand five hundred eighty-seven (188,587) in the Lubbock Division. The breakdown by county is as follows:

County	Total Voters Selected (4%)	Total Voter Population
Bailey	131	3,275
Borden	20	509
Cochran	99	2,484
Crosby	170	4,259
Dawson	251	6,284
Dickens	83	2,084
Floyd	322	8,059
Gaines	207	5,184
Garza	100	2,509
Hale	623	15,584
Hockley	392	9,809
Kent	35	884
Lamb	358	8,959
Lubbock	3,735	93,384
Lynn	162	4,059
Motley	52	1,309
Scurry	315	7,884
Terry	324	8,109
Yoakum	158	3,959
	7,537	188,587

An alphabetical list of the names so selected was prepared and the names placed in the Master Jury Wheel.

Thereafter, one thousand eight hundred eighty-five (1,885) names were selected from the Master Jury Wheel, as provided in paragraph 6(1) of the Plan, and a questionnaire, including appropriate instructions, directing the completion and return of the questionnaire within ten (10) days, was mailed to each person whose name was so selected. As alphabetical list of the names so drawn was prepared.

Of the one thousand eight hundred eighty-five (1, 885) questionnaires mailed, one thousand four hundred twenty (1,420) have now been returned as directed. The Clerk and his deputy clerks have reviewed the answers on the one thousand four hundred twenty (1,420) questionnaires returned and have noted on the back thereof in an appropriate block, based on the information provided by him, whether he is qualified, exempt or entitled to be excused on request. It appears from the information returned on the one thousand four hundred twenty (1,420) questionnaires, for the reasons specified in the appropriate blocks thereof, eight hundred eighty (880) persons may be deemed qualified, one hundred ninety-four (194) persons may be deemed not qualified, twenty (20) persons may be deemed exempt, three hundred twenty-six (326) persons may be deemed entitled to be excused on request and two hundred sixty-one (261) returned undelivered.

RECOMMENDATIONS:

Based solely on the information provided in the return questionnaires, I recommend that we be authorized to purge the existing Jury Wheels. I further recommend that those eight hundred eighty (880) persons whose returned questionnaires reflect no basis for disqualification,

exemption or excuse be found to be qualified and that such finding be reflected by a check mark placed on the juror qualification form and by a check mark placed on the list of names drawn from the Master Jury Wheel to whom questionnaires were mailed.

Based solely on the information provided in the returned questionnaires, I recommend that those one hundred ninety-four (194) persons whose questionnaires reflect information providing a basis for disqualification for the reasons noted on such questionnaires; those twenty (20) persons whose questionnaires reflect information providing a basis for exemption for the reasons noted on the questionnaires; and those three hundred twenty-six (326) persons whose questionnaires reflect information providing a basis for being excused on request for the reasons noted on such questionnaires be found to be not qualified and/or exempt or excused for the reasons reflected on the back of the questionnaires, and that such finding be reflected on the questionaire and the list of names drawn from the Master Jury Wheel.

I further recommend that the existing Qualified Jury Wheel be purged and that the names of eight hundred eighty (880) persons found to be qualified and not exempt or excused be placed in the Qualified Jury Wheel in this Division.

Dated this 27th day of September, 1977.

/s/ Joseph McElory, Jr. Clerk

JOSEPH MCELROY, JR. CLERK
UNITED STATES DISTRICT COURT